Ong Teng For & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-05–355 OF 2009 AND A-05–356 OF 2009
HASAN LAH, ABDUL MALIK ISHAK AND SYED AHMAD HELMY JJCA
25 JULY 2011

Criminal Procedure — Appeal — Conviction and sentence, against — Prosecution's case founded on evidence of single eyewitness — Whether trial judge erred in finding eyewitness to be credible witness — Whether contradictions and discrepancies in testimony of eyewitness would negative his credibility — Whether prosecution's failure to adduce evidence of common intention in opening address affected its case — Whether trial judge had subjected evidence to degree of maximum evaluation — Whether appellate intervention necessary — Penal Code ss 34 & 302 — Criminal Procedure Code s 179(1)

The appellants were tried for causing the death of one Tan Ah Ching ('the deceased'), an offence punishable under s 302 read together with s 34 of the Penal Code ('Code'). The prosecution's case was founded on the evidence of a single eyewitness ('the eyewitness'), an illegal immigrant from Myanmar, who was working for the deceased in the latter's fish farm. According to this eyewitness, the appellants had arrived in a speedboat, which they parked alongside the deceased's speedboat. The eyewitness had then observed the deceased talking to the appellants in angry tones before arming himself with a piece of wood. It was the testimony of the eyewitness that the second appellant had then taken out a pistol which he aimed at the deceased before handing the same to the first appellant. At that point the deceased had retreated but the first appellant had followed him with the pistol in hand, which he shot five times at the deceased. The appellants had then left the scene of the crime in their speedboat, but returned. This time the first appellant had allegedly shot the deceased in the head and both appellants again fled the scene of the crime after warning the eyewitness not to disclose the number of their speedboat. It was the second appellant's defence that he had merely accompanied the first appellant to meet the deceased and he denied taking out the pistol and handing it to the first appellant to shoot the deceased. In his defence the first appellant submitted that it was the deceased who had abused and assaulted the first appellant with a stick. The trial judge found the eyewitness to be a credible witness and from his evidence was satisfied that the deceased was shot by the first appellant using a pistol and of the culpability of the second appellant through the application of common intention under s 34 of the Code. The appellants were thus convicted of murder and sentenced to death. This was the appellants' appeal against that conviction and sentence. The appellants

challenged the trial judge's finding that the eyewitness' evidence was credible and submitted that the contradictions and discrepancies in the eyewitness' testimony, pertaining to his understanding and knowledge of Chinese and Bahasa Malaysia, would negative his credibility. The appellants contended that since their conviction was founded on the evidence of a single eyewitness the trial judge ought to have subjected this witness' evidence to a greater test of credibility in accord with the principle of maximum evaluation. The appellants further submitted that the prosecution's failure to mention any evidence which pointed towards common intention, namely the factum of the second appellant taking out the pistol to hand to the first appellant, in its opening address, further amplified the issue of the eyewitness' credibility.

Held, dismissing the appeal:

(1) It was evident from the trial judge's written judgment that the issue of the eyewitness' limited level of understanding of Chinese and Bahasa Malaysia had been addressed by the trial judge. The totality of the evidence led to the conclusion that the trial judge was correct in his credibility finding and there was no reason for appellate intervention (see para 15).

(2) In actuality, there was no hard and fast rule that the prosecution should mention the essential evidence it would be adducing through its witnesses in support of the charge in its opening address, the omission of which would affect the credibility issue. The word 'shall' appearing in s 179(1) of the Criminal Procedure Code ('CPC') though generally taken to be mandatory was predicated by the word 'propose' which means 'offer or put forward or suggest'. As such, the provision of s 179(1) of the CPC could not be said to be mandatory but rather directory. In the circumstances of this case, the non-mention of the factum of the second appellant taking out the pistol to hand to the first appellant in the prosecution's opening address did not affect the prosecution's case (see para 17).

(3) There were no merits to the appellants' objection to the Myanmar interpreter. The fact that the interpreter was registered as an interpreter by the Federal Court was itself an acknowledgment of his qualification to interpret in the Myanmar language (see para 28).

(4) After analysing the evidence of the first appellant as to assault and rejecting it as unreasonable for acceptance, the trial judge found the testimony of the eyewitness on the issue of whether the deceased assaulted the first appellant to be more credible for acceptance. The reasons for these findings were amply laid out in the record of appeal. Thus there was no merit in the appellants' submission that the trial judge had failed to appreciate the defence of the appellants. This court was of

the view that the conviction in the present case was right and safe and that there was no reason to interfere with the findings of fact by the trial judge (see para 36).

[Bahasa Malaysia summary

Perayu-perayu telah dibicarakan kerana menyebabkan kematian Tan Ah Ching ('si mati'), suatu kesalahan yang boleh dihukum di bawah s 302 yang dibaca bersama s 34 Kanun Keseksaan ('Kanun'). Kes pendakwaan berasaskan kepada keterangan saksi tunggal ('saksi'), seorang pendatang haram dari Myanmar, yang bekerja untuk si mati di ladang ternakan ikannya. Menurut saksi yang melihat sendiri ini ('saksi tersebut'), perayu telah tiba dengan bot laju, yang mereka letakkan di sebelah bot laju si mati. Saksi telah memerhatikan si mati bercakap dengan perayu dalam nada marah sebelum bersenjatakan sebatang kayu. Adalah keterangan saksi tersebut bahawa perayu kedua telah mengeluarkan sepucuk pistol yang diacukan ke arah si mati sebelum melakukan yang sama kepada perayu pertama. Ketika itu, si mati telah berundur tetapi perayu pertama telah mengikutnya, dengan pistol di tangan, yang mana dia menembak si mati sebanyak lima kali. Perayu-perayu telah meninggalkan tempat kejadian jenayah dengan bot laju mereka, tetapi kembali semula. Kali ini, perayu pertama didakwa telah menembak si mati di kepala dan kedua-dua perayu sekali lagi melarikan diri dari tempat kejadian jenayah tersebut selepas memberi amaran kepada saksi untuk tidak mendedahkan nombor bot laju mereka. Adalah menjadi pembelaan perayu kedua bahawa dia hanya menemankan perayu pertama untuk bertemu si mati dan dia menafikan mengeluarkan pistol dan menyerahkannya kepada perayu pertama untuk menembak si mati. Dalam pembelaannya, perayu pertama menghujahkan bahawa si mati yang sebenarnya mendera dan menyerang perayu pertama dengan kayu. Hakim bicara mendapati saksi tersebut sebagai saksi yang boleh dipercayai dan daripada keterangannya, berpuas hati bahawa si mati ditembak oleh perayu pertama menggunakan pistol dan kebersalahan perayu kedua melalui pemakaian niat bersama di bawah s 34 Kanun. Dengan itu, perayu-perayu tersebut disabitkan kesalahan membunuh dan dihukum mati. Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman tersebut. Perayu-perayu mencabar dapatan hakim bicara bahawa keterangan saksi adalah berwibawa dan menghujahkan bahawa percanggahan dalam keterangan saksi berkenaan kefahaman dan pengetahuan bahasa Cina dan Bahasa Malaysia, menegatifkan kredibilitinya. Perayu-perayu menghujahkan bahawa memandangkan sabitan mereka diasaskan pada keterangan saksi tunggal, hakim bicara sepatutnya mensubjekkan saksi kepada ujian kredibiliti yang lebih berat bersesuaian dengan prinsip penilaian maksimum. Perayu-perayu menghujahkan lagi bahawa pihak pendakwaan gagal menyatakan apa-apa keterangan yang menuju ke arah niat biasa, iaitu kejadian di mana perayu kedua mengeluarkan pistol untuk diserahkan ke perayu

A pertama, di ucapan pembukaan, seterusnya dikuatkan lagi dengan isu kredibiliti saksi.

Diputuskan, menolak rayuan:

B (1) Adalah jelas daripada penghakiman bertulis hakim bicara bahawa isu tahap kefahaman terhad bahasa Cina dan bahasa Malaysia saksi telah ditangani oleh hakim bicara. Keseluruhan bukti membawa kepada kesimpulan bahawa hakim bicara betul dalam dapatan kredibilitinya dan tidak ada sebab untuk campur tangan rayuan (lihat perenggan 15).

C (2) Kenyataannya, tidak ada peraturan tegas dan pantas bahawa pihak pendakwaan perlu menyebut bukti penting yang akan dikemukakannya melalui saksi-saksinya untuk menyokong pertuduhan tersebut dalam ucapan pembukaan, peninggalan yang akan memberi kesan kepada isu D kredibiliti. Perkataan 'hendaklah' yang terdapat dalam s 179(1) Kanun Prosedur Jenayah ('KPJ') walaupun kebiasannya dianggap sebagai mandatori telah didahului oleh perkataan 'bercadang' yang bermaksud 'tawaran atau mengemukakan atau mencadangkan'. Oleh itu, peruntukan s 179(1) KPJ tidak boleh dikatakan sebagai mandatori tetapi E direktori. Dalam hal keadaan kes ini, bukan ketiadaan sebutan kejadian perayu kedua yang mengeluarkan pistol untuk menyerahkannya kepada perayu pertama dalam ucapan pembukaan pendakwaan tidak menjejaskan kes pendakwaan (lihat perenggan 17).

F (3) Tiada sebarang merit terhadap bantahan kepada jurubahasa Myanmar perayu. Hakikat bahawa jurubahasa telah didaftarkan sebagai seorang jurubahasa oleh Mahkamah Persekutuan adalah dengan sendirinya suatu pengakuterimaan kelayakannya untuk mentafsir dalam bahasa Myanmar (lihat perenggan 28).

G (4) Selepas menganalisa keterangan perayu pertama mengenai serangan dan menolaknya kerana tidak munasabah untuk penerimaan, hakim bicara memutuskan keterangan saksi tersebut mengenai isu sama ada si mati menyerang perayu pertama sebagai lebih berwibawa untuk penerimaan. H Sebab-sebab dapatan ini telah dinyatakan secukupnya dalam rekod rayuan. Oleh itu, tiada merit dalam hujahan perayu bahawa hakim bicara telah gagal untuk menerima pembelaan perayu-perayu. Mahkamah ini berpendapat bahawa sabitan dalam kes ini adalah betul dan selamat dan bahawa tiada sebab untuk campur tangan dengan dapatan fakta oleh I hakim bicara (lihat perenggan 36).]

Notes

For cases on conviction and sentence, against, see 5(1)(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 288–331.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) [1996] 2 MLJ 517, FC (refd)
Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Hee Nyuk Fook v PP [1988] 2 MLJ 360, SC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
OSK Securities Bhd v Probo Pacific Leasing Pte Ltd [2009] 2 MLJ 87, CA (refd)
PP v Sa'ari Jusoh [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (refd)
Pendakwa Raya v Zainal Arpan bin Molana (Court of Appeal Criminal Appeal No Q-05–146 of 2006) (refd)
People (Director of Public Prosecutions), The v C [2001] 3 IR 345 (refd)
R v Solomon [1979] 1 A Crim R 247 (refd)
Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd [2008] 2 MLJ 87, CA (refd)
Yee Wen Chin v PP & Anor Appeal [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)
Zaheed bin Ahmad & Ors v Tham Poh Theng & Ors [2007] 6 ML J 78, CA (refd)

Legislation referred to

Criminal Procedure Code ss 158(ii), 179(1)
Penal Code ss 34, 302

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellants.
Murtazadi bin Amran (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Syed Ahmad Helmy JCA (delivering judgment of the court):

[1] The appeal herein is concerned with the degree of maximum evaluation that the evidence of a single witness upon which the conviction was founded should be subjected to by the trial court. It is the appellants' contention that since the conviction was founded on the evidence of a single witness the court must subject his evidence to a greater test of credibility in accord with the principle of maximum evaluation.

[2] Both the appellants herein were tried, convicted and sentenced to death by the trial judge for causing the death of one Tan Ah Ching (the 'deceased') an offence punishable under s 302 of the Penal Code read together with s 34 of the same Code. Both the appellants now appeal to this court against the conviction and sentence.

[3] The narrative of the prosecution's case was admirably set out by the learned trial judge at pp 10–14 of Vol I of the appeal record. The prosecution's

A case as distilled from the evidence of the principal witness Sonai a/l Uchor (SP3), an illegal immigrant from Myanmar, was that on the 15 April 2004 he was working for the deceased in the latter's fish farm. At about 5.30pm he noticed a speed boat which came and parked beside the speedboat belonging to the deceased. There were two occupants in the speedboat, subsequently B identified as the appellants. They called for the deceased. As the deceased did not hear SP3 alerted him. He then heard the deceased talking to the appellants in angry tones. He saw the deceased then armed himself with a piece of wood. It was his testimony that he saw the second appellant taking out a pistol and aimed at the deceased. The second appellant then handed the pistol to the first C appellant. Upon seeing it the deceased retreated to a grinding machine for fish food.

[4] SP3 said that the first appellant, armed with the pistol, then followed the D deceased to the grinder and shot the deceased five times. The first appellant then went back to the speedboat and left with the second appellant. SP3 noticed that the deceased had two gunshot wounds and tried to assist him. It was SP3's further evidence that both the appellants returned. This time both the appellants got out of the speed boat and approached the deceased. The E deceased had asked SP3 to distance himself. The first appellant fired one shot on the right side of the deceased's head. The second appellant was said to have warned SP3 not to disclose to anyone the number of their speedboat. Both the appellants then left.

F **[5]** SP3 then drove the deceased's boat to look for help. While on his way he met SP5, the deceased's younger brother, and told him that the deceased had been shot.

G **[6]** The evidence of SP3 was subjected to vigorous cross-examination by learned defence counsel on the aspect of several visits by the deceased's wife and the deceased's family solicitor with a view of persuading SP3 to give evidence favourable to the deceased. The central focus of this head of challenge was that the counsel who was engaged by the deceased's family to hold a watching brief H coached SP3 to give favourable evidence and hence it is incumbent upon the prosecution to call or at least offer the appointed counsel for cross-examination to dispel the coaching suggestion, the failure of which has further compromised the credibility of SP3. In support of the challenge learned defence counsel referred to SP3's evidence appearing at pp 68–70 of the appeal I record.

[7] The learned trial judge in analysing the testimony of SP3 found him to be a witness of truth and his evidence credible. From the evidence adduced the learned trial judge was satisfied that the deceased was shot by the first appellant

using a pistol and the culpability of the second appellant through the application of common intention under s 34 of the Penal Code.

[8] Learned defence counsel challenge to the learned trial judge's findings is that SP3's evidence is not credible for acceptance as given his status as an interested witness (being an illegal immigrant nevertheless was given employment by deceased) the learned trial judge should have tested his evidence from the angle of motive and the contradictions and/or discrepancies present which would have negatived the credibility of SP3. The contradiction and discrepancies highlighted by learned defence counsel pertains to portions of his evidence as to his understanding and knowledge of Chinese and Bahasa Malaysia which learned counsel submits was an attempt by SP3 to portray himself as a person who completely did not understand Chinese and Bahasa Malaysia. It is obvious according to learned counsel that SP3 had perpetrated a deliberate lie and hence it is incumbent upon the trial court to have approached SP3's evidence with caution. In the light of the lie on his understanding of both Chinese and Bahasa Malaysia SP3 cannot be discounted from perpetrating lies and/or embellish other aspects of his evidence as regards the second appellant who took out the pistol, aiming at the deceased and passing it to the first appellant; that the deceased never attacked the first appellant and there was no struggle between the two; that he heard the first appellant firing five shots; that both appellants came back a second time when the first appellant went to the platform and shot the deceased.

[9] In further amplification on the issue of SP3's credibility learned defence counsel alluded to the prosecution's opening address principally to the absence of any mention of evidence which points towards common intention namely the factum of the taking out of the pistol by the second appellant and his subsequent handing over of the pistol to the first appellant after taking aim at the deceased and both appellants turning back immediately and the firing of one shot at the deceased's head by the first appellant. The authorities relied upon by learned defence counsel in support of the omission aforesaid which casts aspersion on SP3's credibility are *Yee Wen Chin v Public Prosecutor & Anor Appeal* [2008] 6 MLJ 222; [2008] 6 CLJ 773 and*Pendakwa Raya v Zainal Arpan bin Molana* (Court of Appeal Criminal Appeal No Q-05–146 of 2006). Both the cases cited submits learned counsel supports the proposition that essential evidence not mentioned in the opening address but subsequently finds its way in the trial amounts to an afterthought.

[10] Challenge was also mounted on the failure of the trial judge to appreciate the defence of both the appellants in that the second merely accompanied the first appellant to meet the deceased, that he had known the deceased since childhood days and bore no animosity towards him, that the deceased abused and hit. The first appellant with a stick, surrendering himself

to the Balai Polis Bagan Serai and his denial of taking out the pistol and handing it over to the first appellant who subsequently shot the accused. The non-appreciation of the first appellant's defence was the failure to appreciate the evidence of the injuries suffered by him which injuries is consistent with his evidence that he was assaulted by the deceased when he was on the platform after being invited by the deceased. Further the medical report IDDI ought to have been admitted although the doctor was not called as it is a public document made by a government medical officer.

[11] The final ground of challenge was the refusal of the trial judge to accede to the defence request to call the Myanmar interpreter to state his qualifications. The challenge is premised on defence counsel contention that the Myanmar interpreter being a free lance interpreter who is only registered with the Federal Court is not qualified.

[12] We shall now address our minds to the several heads of challenge mounted by learned defence counsel.

[13] On the challenge that SP3's evidence should be tested from the angle of motive and the contradiction and discrepancies appearing between his testimony in examination-in-chief and cross-examination and against the evidence of SP5 and SP10 in determining the issue of SP3's credibility the learned trial judge had conducted an evaluation of the evidence as elucidated through SP3, SP5 and SP10 and was satisfied of SP3's credibility on his comprehension and understanding of Bahasa Malaysia. The trial judge's rationale was that though he may not be proficient nevertheless there was ample evidence that he could speak and understand Bahasa Malaysia.

[14] The issue of the limited level of SP3's understanding of Bahasa Malaysia and Chinese was addressed by the learned trial judge at p 33 of the record of appeal where he opined:

> Saya percaya dengan keterangan SP3 bahawa kefahaman Bahasa Malaysia dan Cinanya terbatas. Beliau memerlukan khidmat jurubahasa Myanmar ketika memberi keterangan di mahkamah dan ketika menghadiri kawad cam.
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> SP5 adik kepada SP3 juga mengatakan walaupun beliau bercakap dengan SP3 dalam Bahasa Malaysia, SP5 mengaku Bahasa Malaysia nya dan juga SP3 tidak berapa bagus.

[15] It is evident from the learned trial judges written judgment that he addressed his mind to the contradiction between the prosecutions' witnesses as to SP3's level of comprehension of Bahasa Malaysia and Chinese language in arriving at his conclusion of the credibility of SP3. He had also in arriving at his credibility finding of SP3's evidence took into consideration the sign language

communication of SP3 and the reasons advanced by SP4 as to the several visits to SP3. The totality of the evidence leads us to conclude that the trial judge was correct in his credibility finding and there is no reason for appellate intervention.

[16] In upholding the credibility finding we have also carefully considered the arguments advanced by learned defence counsel on the absence of any mention in the opening address of certain essential parts of SP3's evidence namely the factum of the second appellant producing the pistol taking aim at the deceased before handing it over to the first appellant and the fact of both appellant coming back and the first appellant firing one shot at the deceased's head.

[17] From a historical perspective opening address plays an important role in addressing the jury in this country as to the brief evidence intended to be proved by the prosecution before the trial begins. However, when the jury system was abolished way back in 1994, this provision remains in our statute book. Apart from the information laid in the charge against the accused and the supply of documents to the defence, the opening address invariably serves some purpose, if not all, to the accused in strategising his defence. In actuality, there is no hard and fast rule in tendering the opening address as it depends on the facts and circumstances of a particular case. The more complex the case the more there is a need for an opening address. Learned counsel submits that the presence of the word 'shall' in s 179(1) of the Criminal Procedure Code makes it mandatory for the prosecution to mention the essential evidence that the prosecution would be adducing through its witnesses in support of the charge, the omission of which would affect the credibility issue. We disagree with learned counsel contention and is of the view that it is directory in nature.

[18] Section 179(1) of the Criminal Procedure Code reads as follows:

> The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

[19] The word 'shall' appearing in the section is to our mind predicated by the word 'propose' which in its dictionary meaning is to 'offer or put forward or suggest'. Since the section relates to the evidence which is to be offered or put forward or suggested the regulation of the nature thereof is reposed to the officer conducting the prosecution and hence in that context s 179(1) of the Criminal Procedure Code cannot be said to be imperative or mandatory but directory.

[20] In support of the 'directory' nature of the section we allude to the case

Hee Nyuk Fook v Public Prosecutor [1989] 2 MLJ 360 where the Supreme Court dealt with the issue as to whether s 158(ii) of the Criminal Procedure Code is a mandatory or directory. The Supreme Court was of the view that the word 'shall' appearing need not be a mandatory procedure in every case as it depends on the facts and circumstances of each case. At p 362, it was held, inter alia:

> The question that arises is whether s 158(ii) is mandatory or directory. In our view, the word 'shall' appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see *Interpretation of Statutes* by Bindra, (7th Ed), at p 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory (see *Howard v Bodington* [1877] 2 PD 203 at p 211).
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> Applying the test to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of s 158(ii) is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of trial. A fortiori in the light of the provision of s 422 of the Code. The nature of the amendment being purely technical and in no way substantial has not rendered the omission to read over and explain the amended charge to the applicant at the close of the defence a serious irregularity as to vitiate the proceeding or has occasioned a failure of justice.

[21] It is also instructive to note that in the case of *The People (Director of Public Prosecutions) v C* [2001] 3 IR 345, the Court of Criminal Appeal was of the view that the prosecution is not bound by its opening address. At p 9, the court had this to say, inter alia:

> … It is in the very nature of the trial process where evidence is presented and tested, that new facts or elements may emerge as the trial proceeds. As the learned trial judge indicated the mere fact that a conflict of evidence has emerged which was not reflected in the opening of the case by the prosecution is not a basis for directing a verdict of not guilty. If something emerges during a trial which goes to the very root of the prosecution case rendering it tenuous or dangerous upon which to convict then such an issue, having been addressed on its own merits, would be a ground of such a direction to a jury. The mere fact that the prosecution, in opening the case, did not anticipate a particular conflict of evidence is not such a ground. No basis has been established upon which the trial judge should have directed the jury to acquit and this ground of appeal must be refused.

[22] In the local context it is indeed worthwhile to look at the decision of *Public Prosecutor v Sa'ari Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197 wherein the Federal Court was of the view that no doubt the prosecution diverted their

strategy from the opening address tendered it was not fatal 'so long as the accused was not placed in a tactical disadvantage with resultant unfairness to him'. At pp 218–219, the Federal Court held, inter alia:

> However, there may be instances where the prosecution has indicated the basis upon which it seeks a conviction and the evidence adduced demonstrates a further basis for conviction on the offence charged or an alternative offence which is available at law. Is the prosecution bound by what was stated in the opening address in such circumstances? In resolving this issue the Court of Criminal Appeal of South Australia said in *R v Franco* [2003] SASC 140:
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> Although it is desirable that the prosecution should indicate at the commencement of the trial the basis upon which it seeks a conviction, there will be cases in which the course of the evidence gives rise to the possibility of a further basis for conviction on the offence charged or the basis for a conviction on an alternative offence which is available at law. An important consideration for the trial judge in deciding whether to leave to the jury a path to conviction not previously mentioned is whether the accused has had an adequate opportunity to test evidence relevant to such reasoning, to call evidence relevant to it, and to address the jury on it.
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> A trial judge is not bound by the prosecutor's formulation of its case. It may be necessary for the judge to consider whether it is appropriate to leave alternative verdicts to the jury or direct on alternative paths to conviction irrespective of whether such alternatives are relied upon by the prosecution. However, it is essential when considering such a course to have regard to whether unfairness would result if, through no fault of the defence, the alternative basis had not been properly addressed during the trial.

[23] The function of the trial judge and the approach to be adopted by an appellate court in these circumstances were summarised by Street CJ in *R v Solomon* [1979] 1 A Crim R 247, at pp 249–250:

> Ordinarily, it is the province of the Crown to formulate and present the case for the prosecution which will, in due course, be summed up by the judge to the jury. There may, however, be other matters of fact or law which the trial judge, in the discharge of his duty to ensure a fair trial according to law, considers it necessary to put to the jury, even though not propounded or developed by the Crown. The fairness or unfairness of travelling beyond the ground covered by the Crown will, of course, be evaluated by the trial judge and will be to the forefront in deciding how far, if at all, to put new considerations to the jury. It seems to me that, where a judge does cover fresh ground in terms that are correct in law and properly based on evidence in the case, at the highest his decision so to do will only be challengeable if it can be seen that the accused person was thereby placed at a tactical disadvantage. In such a situation, appellate intervention would be appropriate, not by reason of the judge having canvassed fresh ground simpliciter, but by a reason of unfairness attending his so doing. The relevant unfairness will ordinarily be looked for in procedural considerations. The judge, drawing upon his own forensic experience, will be readily appreciative of the tactical considerations which will have governed counsel in the

A conduct of the case for the accused. Objections to evidence, lines of cross-examination and decisions upon the material to be advanced on behalf of the accused, not to mention the general trend of the final address to the jury made on behalf of the accused, will all, of course, have been governed by the nature of the Crown case as opened by the prosecutor and developed through evidence tendered on behalf of the Crown at the trial. It is readily understandable that within these procedural and tactical fields there could arise an element of real prejudice if the judge, in his summing-up, raised new approaches available to, but not expressly relied upon, by the Crown. But in every case in which a question arises regarding the development of new approaches, the question concerning the judge at first instance, and on appeal the question concerning this court, will be to determine whether in so doing there will be worked an unfairness to the accused.

[24] In *R v Solomon* [1979] 1 A Crim R 247, at p 222, Street CJ also adverted to the judgment of his brother judge Moffitt P and had this to say:

D In dealing with the proper way in which a conviction can be secured on a basis not opened by the prosecution, Moffitt P said at pp 256–257:

With respect, where it appears to a presiding judge that the evidence in the case leaves open a finding say of murder on a basis not opened by a Crown prosecutor, the better course is to raise the matter with counsel prior to final addresses. Then, according to the responses of counsel, a decision can be made whether it is appropriate that the direction be given. Counsel can be informed of the proposal with the result that the jury will have the benefit of the submissions of both counsel upon the question. The accused then will not be deprived of the opportunity of having submissions made thereon on his behalf. If counsel for the accused claims he has been deprived of some opportunity to cross-examine or lead evidence, the presiding judge will be in a superior position to consider any question of prejudice. This did not occur.

It was further contended at the trial and before us that counsel for the appellant was also deprived of an opportunity to cross-examine witnesses on the omitted issue. It may well be that no additional question would or could have been asked and we were not told of any such, but I am inclined to the view that similar considerations apply as do in relation to counsel's address. However, the failure to raise the matter before counsel's address is sufficient in my view to render the trial unsatisfactory so that there was a miscarriage of justice requiring this court's intervention.

It follows that a verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical advantage with resultant unfairness to him. This conclusion is consistent with s 422 of the Criminal Procedure Code ('the Code') which reads as follows:

Subject to the provisions contained in this chapter no finding sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:

(a) any error, omission or irregularity in the complaint, section, consent, summons,

warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code: or

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence, unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[25] Thus to our mind the non-mention of the aforesaid evidence in the opening address does not affect the prosecution's case. The Federal Court in *Public Prosecutor v Sa'ari Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197 has in no uncertain terms held that the prosecution is not fettered from adducing evidence not mentioned in the opening address. In this connection the two cases relied upon by learned defence counsel is clearly distinguishable in that in *Yee Wen Chin v Public Prosecutor & Another Appeal* [2008] 6 MLJ 222; [2008] 6 CLJ 773 the omission was in respect of the act of carrying which is a factum of critical importance to establish the element of trafficking. Again the unreported decision of *Pendakwa Raya v Zainal Arpan bin Molana* (Rayuan Jenayah Q-05–146 tahun 2006) the omission relates to the omission of an admission which is an important piece of evidence pointing towards guilt.

[26] Turning to the second ground of challenge in that the prosecution's failure to call or at least to offer Mr Ranjit Singh (the solicitor for the family of the deceased) for cross-examination has compromised the credibility of SP3 is to our mind without merits. Though there was a suggestion that the visit by Mr Ranjit Singh to SP3 was to coach SP3 to give evidence in court nevertheless it was vehemently denied by SP3.

[27] In this connection we have carefully perused the notes of evidence and must confess that we are unable to find evidence of any attempt by Mr Ranjit Singh to coach SP3 – hence the necessity to call him as a witness or offer him for cross-examination does not arise.

[28] We now come to the issue of the Myanmar interpreter. From the notes of evidence appearing in the record of appeal the objection against the interpreter was raised after completion of not only the evidence of SP3 but also that of SP4 and SP5. The evidence of SP3 was recorded over a space of four days namely 3 January 2006, 4 January 2006, 5 January 2006 and 11 January 2006 and objection was only raised on 13 January 2006. From the record no objections were raised against the interpreter during the course of the recording of the evidence of the five witnesses. The fact that he is a free lance interpreter not from the Myanmar Embassy and not engaged full time by the Federal Court does not to our mind result in the evidence of SP3 as interpreted by him being unacceptable. Being registered as an interpreter by the Federal Court is

by itself an acknowledgement of his qualification to interprete in the Myanmar language — hence there is no necessity for the court to recall the interpreter just to state his qualification. The objection is without any merits whatsoever.

[29] The third and final ground of challenge by learned defence counsel is against the failure of the learned trial judge to appreciate the defence of the appellants. We had in the earlier part of our judgment laid out the several aspects of both the appellants' defence which learned counsel submits that the learned trial judge failed to appreciate. Upon perusing the appeal record we have to reject this ground of challenge as the learned trial judge did address and analyse the defence before dismissing same. This was what the learned trial judge had to say at pp 26–27 of the record of appeal:

> Keterangan T1 bahawa si mati telah memukulnya dengan sebatang kayu panjang adalah diragukan. Ini berdasarkan kepada keterangan T1 sendiri di ms 95 dan 96 nota keterangan:
>
> Bila saya naik (ke atas pelantar) simati terus pukul saya dengan sebatang kayu. Kena pada belakang tapak tangan saya. Tangan saya cedera.
>
> Saya menghampiri si mati kerana tidak mahu bergaduh dengannya. Si mati buang kayu dan lari sehingga ke rumah enjin proses makan ikan.
>
> Saya ekorinya kerana takut si mati akan ambil sesuatu untuk pukul saya.

[30] The learned trial judge in analysing the evidence of the first appellant rejected it as unreasonable for acceptance and gave his reasons for doing so which he stated at p 27:

> Keterangan T1 adalah tidak munasabah langsung. Sekiranya benar si mati telah memukulnya, si mati telah pun membuang kayu itu dan lari kebelakang. Jadi apa perlu T1 terus mengekori si mati. Alasannya bahawa beliau takut si mati tidak akan mengambil sesuatu untuk memukulnya lagi adalah tidak munasabah kerana:
>
> (a) sekiranya benar si mati masih mahu memukul T1 apa perlu si mati membuang kayu panjang yang dipegangnya dan mencari benda lain pula untuk memukul T1; dan
>
> (b) T1 mengatakan setelah dipukul dan cedera beliau menghampiri si mati kerana tidak mahu bergaduh dengan si mati. Kemudiannya beliau mengatakan memukulnya lagi. Sekiranya tidak mahu bergaduh dan takut dipukul oleh si mati sepatutnya turun semula ke botnya, bukan mengekori si mati.

[31] After rejecting the first appellant's testimony as to the assault, the learned trial judge found the testimony of SP3 on the issue of whether or not the deceased assaulted the first appellant more credible for acceptance. His reasons was amply laid out at p 27 of record of appeal wherein he stated:

> Jawapan yang munasabah telah diberikan oleh SP3. Menurut SP3 semasa T1 dan T2 sampai telah berlaku pertengkaran diantara T1 dan T2 dengan si mati. Si mati yang berada di pelantar ikan telah mengambil sebatang kayu panjang. Melihatkan tindakan si mati itu T2 yang berada di atas botnya telah mengeluarkan sepucuk pistol dan mengacukannya kepada si mati. Melihatkan pistol diacukan kepadanya, si mati telah membuang kayu yang dipegangnya.
>
> Ini menunjukkan si mati menjadi takut apabila melihat pistol diacukan kepadanya dan beliau melarikan diri ke belakang.

[32] In conclusion we wish to reiterate the trite principle that an appellate court will not readily interfere with findings of fact by the trial court to which the law entrusts the primary task of evaluation of the evidence, except in cases where the appellate court is convinced that the trial court has so fundamentally misdirected itself that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (ie plainly wrong). See (i) *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd* [2008] 2 MLJ 87, (ii) *Zaheed bin Ahmad & Ors v Tham Poh Theng & Ors* [2007] 6 ML J 78, (iii) *OSK Securities Bhd v Probo Pacific Leasing Pte Ltd* [2009] 2 MLJ 87, (iv) *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1.

[33] The logic for this is found in the fact that the appellate court does not have the audio visual advantage afforded to the trial court, in seeing, hearing and assessing the witnesses at the trial. Hence, an appellate court is not likely to reverse or depart from the trial judge's finding save where he has misdirected himself. See *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd)* [1996] 2 MLJ 517.

[34] In *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 91, the Federal Court has echoed the same principle long ago and had this to say at p 93, inter alia:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.

[35] The principle of law governing appeals in criminal cases on questions of fact are well established, in that the appeal court will not interfere unless the

balance of evidence is grossly against the conviction especially upon a finding of specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.

[36] Upon evaluating the record of appeal we are of the considered view that the conviction is right and safe. The learned trial judge had very carefully analysed all the available evidence before him and made specific findings of fact founded upon that which he believed to be the truth. He also drew certain inferences from facts specifically found. In this respect we may form our independent view but we should only do so where the fact upon which the inference was drawn was either unwarranted or manifestly against the weight of evidence. That was not the case here. In considering the appeal before us we gave very serious consideration to the submissions made by both learned defence counsel and learned deputy. In our judgment there was no merit in learned defence counsel argument and we are in full agreement with the findings and conclusion of the learned trial judge. We therefore dismissed the appeal against conviction and sentence.

Appeal dismissed.

Reported by Kohila Nesan